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AUGUST 28, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Ashley Kenneth Hunter,

Petitioner - Appellant,

vs.

Supreme Court No. 20200160
District Court No. 09-2019-CV-02260

State of North Dakota,

Respondent – Appellee,

APPELLEE'S BRIEF

Appeal from Judgment
Entered May 18, 2020
East Central Judicial District
the Honorable Stephannie N. Stiel, Presiding

ORAL ARGUMENT REQUESTED

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[¶ 5] II. Whether the district court erred in denying Hunter's post-conviction claim of judicial bias at trial.

[¶ 6] III. Whether the district court erred in denying Hunter's post-conviction claim that his statement to officers was unconstitutionally acquired.

[¶ 7] STATEMENT OF THE CASE

[¶ 8] The State concurs with Hunter's Statement of Case. In addition, this Court issued an opinion affirming his conviction, which relates closely to multiple issues raised in Hunter's post-conviction claims. State v. Hunter, 2018 ND 173, 914 N.W.2d 527, cert. denied, 139 S. Ct. 804 (2019).

[¶ 9] ORAL ARGUMENT REQUEST

[¶ 10] The State requests oral argument because Hunter challenges the district court's application of res judicata, the trial attorney testified that he was ineffective and the underlying case involves two murders.

[¶ 11] STATEMENT OF THE FACTS

[¶ 12] The State concurs with the facts contained within Appellant's Brief, except as clarified below. The State provides additional facts below.

[¶ 13] In paragraph 5 of Appellant's Brief, Hunter indicates he argued at the evidentiary hearing for additional time to respond to the State's affirmative defenses. At the close of the hearing, the district court asked Hunter what additional

evidence, beyond the proffer provided by Dr. Mugge, he wished to present on the affirmative defenses. Hunter stated he did not wish to present further evidence and was satisfied the schedule for written closing arguments provided adequate opportunity to address all his points. (PCR Doc ID# 34, Tr. 169:2-14, 174:23-177:2, 184:6-10, 188:23-24.) Hunter later amended that statement to say that if the district court did not deny his false confession claim on the basis of res judicata, he would like Dr. Mugge to evaluate him, if it were possible to do so retrospectively, and if favorable then to present that to the court at a later evidentiary hearing. (PCR Doc ID# 34, Tr. 183:3-184:5.)

[¶ 14] In paragraph 7 of Appellant's Brief, Hunter indicates that decedent Clarence Flowers was stabbed "numerous" times. Although not incorrect, the autopsy report reflects Mr. Flowers suffered 77 stab or laceration wounds. (Crim. Doc ID# 413.)

[¶ 15] In paragraph 8 of Appellant's Brief, Hunter indicates he was questioned by police while suffering from extreme exhaustion and serious mental impairment caused by methamphetamine use. Hunter allegedly tried to hurt himself at the police station, so police took him to the hospital. An emergency room nurse said about Hunter that his vitals were normal, his demeanor was "calm, cooperative", "not agitated" and "pretty even-keeled", and she could find no indications of any ligature marks or asphyxiation from a cord. (Crim. Doc ID# 634, Tr. 1351:9-14, 1357:13-16, 1354:14-21.)

[¶ 16] In paragraph 11 of Appellant's Brief, Hunter indicates his trial attorney (Gereszek) filed a motion to suppress Hunter's statements to police that was not materially different than what was filed by Hunter's earlier attorney (Thornton). (Crim. Doc ID# 79 (Thornton's suppression brief); Crim. Doc ID# 256 (Gereszek's suppression brief); PCR Doc ID# 34, Tr. 32:2-8.) Hunter explains attorney Thornton's earlier brief focused on a coerced confession theory. He also states, in bold, that the topic of Miranda warnings was not addressed by attorney Thornton. However, Hunter's point here is a bit confusing. Standing alone, it seems to imply that due to limited preparation time attorney Gereszek simply followed attorney Thornton's earlier lead on a coerced confession and did not argue a Miranda violation. However, that was not the case. Although attorney Gereszek's suppression brief argued Hunter's confession was coerced, it also mentioned Miranda at least eight times, arguing Hunter "was never provided Miranda warnings, before, during, or after" his questioning by police. (Crim. Doc ID# 256, ¶¶5-8.) Additionally, attorney Gereszek's brief argued Hunter's statements to hospital staff should be suppressed. He also filed a separate motion for a Franks hearing, requesting the trial court find that Hunter's arrest and questioning was without cause, a motion for a change of venue and a demand for a change of judge. (Crim. Doc ID# 247, 248, 253, 260, 261.)

[¶ 17] In paragraph 16 of Appellant's Brief, Hunter indicates his trial counsel discovered at the motion hearing on April 26, 2017, that Hunter "wasn't even Mirandized". (PCR Doc ID# 34, Tr. 32:8-10.) However, his trial counsel

apparently misremembered the circumstances. As noted above, in his suppression brief Hunter's trial counsel argued Hunter did not receive Miranda warnings. That brief was dated April 7, 2017, nearly three weeks before the suppression hearing. (Crim. Doc ID# 256, ¶¶5-8.) The trial court ruled that Hunter was provided the warnings. (Crim. Doc ID# 329, p2-8.)

[¶ 18] In paragraph 20 of Appellant's Brief, Hunter indicates it would take Dr. Mugge two months to conduct her evaluation for the presence of a false confession. Dr. Mugge's proffer was more varied on that point. She stated it would take "at least a month, if not more". (PCR Doc ID# 34, Tr. 137:11-16.) However, she also stated that in ideal circumstances she would need about two weeks. (PCR Doc ID# 34, Tr. 138:1-3.)

[¶ 19] Traditionally, post-conviction cases are heard by the trial judge. In Hunter's case, the trial judge retired before Hunter filed post-conviction relief. Notwithstanding that, near the close of trial the judge opined that Hunter's trial counsel had effectively represented Hunter, even though the court made some evidentiary decisions unfavorable to Hunter. (Crim. Doc ID# 636, Tr. 1756:13-1757:15.)

[¶ 20] A brief incident report, or charging summary, was filed when the charging document was filed on June 24, 2015. In that incident report, it mentions that Hunter was "mirandized". (Crim. Doc ID# 2.)

[¶ 21] The trial court judge said to one of Hunter's attorneys, at a discussion about whether that attorney should be allowed to withdraw because of a potential

conflict of interest: “I don’t know if it was in an in-chambers conference we had or if it was something I read in the paper, about Mr. Hunter being very happy with you. You have a good relationship with Mr. Hunter; is that correct?” (Crim. Doc ID# 620, Tr. 22:10-18.)

[¶ 22] After a 2-1/2 hour suppression hearing, the trial court issued a 25-page decision denying Hunter’s suppression motion. (Crim. Doc ID# 306; Crim. Doc ID# 329.)

[¶ 23] The district Court found that the affirmative defenses were not waived. (PCR Doc ID# 35, ¶12.)

[¶ 24] The jury watched and heard the entire video of Hunter’s confession to investigators, and related testimony about the conditions. (Crim. Doc ID# 632, Tr. 881:20-882:2, 895:15-910:20, 915:13-917:14.)

[¶ 25] ARGUMENT

[¶ 26] I. The district court did not err in denying Hunter's post-conviction claim of ineffective assistance of counsel.

[¶ 27] Hunter claims ineffective assistance of counsel generally, and then combined with his two additional claims regarding judicial bias and his confession to police. The State addresses the general claim of ineffective assistance in §I of this brief. The State addresses the two specific claims in §§II-III of this brief.

[¶ 28] A. Standard of review

[¶ 29] This Court's standard of review for post-conviction proceedings has been clearly established:

> A trial court's findings of fact will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). A finding is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made. Questions of law are fully reviewable on appeal of a post-conviction proceeding.

Brewer v. State, 2019 ND 69, ¶4, 924 N.W.2d 87 (citations omitted). The question of ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. Id., at ¶5. However, "[e]ven under de novo review, the standard for judging counsel's representation is a most deferential one. … It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence." Id.

[¶ 30] B. Ineffective assistance of counsel – law

[¶ 31] Post-conviction proceedings are civil in nature. The applicant carries the burden of establishing the grounds for relief. Rourke v. State, 2018 ND 137, ¶5, 912 N.W.2d 311 (citations omitted). Claims of ineffective assistance of counsel are governed by the two-pronged Strickland test. The applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)). The Strickland test is a "high bar" and must be applied with "scrupulous care". Id. As for the first prong (reasonableness), the applicant must overcome the strong presumption that counsel's representation fell within with the wide range of reasonable professional assistance. Courts "must consciously attempt to limit the distorting effect of hindsight." Id. There is a "wide range of actions that are considered 'reasonable professional assistance.'" Brewer, at ¶6. As for the second prong (prejudice), prejudice should not be assumed. The applicant must demonstrate a "reasonable probability" that but for counsel's allegedly unprofessional errors the result would have been different. The applicant must also specify how and where counsel was incompetent and the probable different result. Brewer, at ¶9. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. A court does not need to address both prongs. "[I]f a court can resolve the case by addressing only one prong it is encouraged to do so." Rourke, at ¶6 (citations omitted).

[¶ 32] C. Hunter's counsel was not ineffective

[¶ 33] Hunter claims his counsel was ineffective at getting a change of judge in light of the trial court's alleged bias. This is addressed in detail in §II of this brief. Hunter also claims that had his counsel sought a continuance to allow him further time to prepare for trial, the trial court would not have denied him the right to present a defense by denying his expert witness on false confessions. This is addressed in detail in §III of this brief. The topics of res judicata and ineffective representation are each addressed in those sections.

[¶ 34] **II. The district court did not err in denying Hunter's post-conviction claim of judicial bias at trial.**

[¶ 35] Hunter argues res judicata does not bar his post-conviction judicial bias claim, the trial judge was biased and his trial counsel was ineffective in addressing that bias.

[¶ 36] A. Applicability of res judicata

[¶ 37] Hunter argues the district court should not have recognized the State's assertion of the affirmative defenses of res judicata and misuse of process in denying any of his post-conviction claims. N.D.C.C. §29-32.1-12. These affirmative defenses must be pled by the state, which carries the burden of proof. Id.; Johnson v. State, 2010 ND 213, ¶¶10-11, 790 N.W.2d 741 (court may not summarily dismiss a PCR petition on res judicata grounds where state had not yet had a chance to respond and assert the affirmative defense). It is res judicata to allege an issue in post-conviction that was already decided on direct appeal. Red Paint v. State, 2002

ND 27, ¶¶10-11, 639 N.W.2d 503. It may be a misuse of process to raise something during PCR that could have been raised on direct appeal. Id.

[¶ 38] In its written response to Hunter's post-conviction petition, the State asserted the affirmative defenses of res judicata and/or misuse of process. (PCR Doc ID# 20, ¶11.) Hunter argues the State's response was untimely, and hence the State waived the defenses. According to N.D.C.C. §29-32.1-06: "Within thirty days after the docketing of an application or within any further time the court may allow, the state shall respond by answer or motion." At the November 22, 2019 hearing Hunter was not present, the court rescheduled the hearing, the State indicated it would file a written response and subsequently did so. The court did not set a schedule for that response. The State acknowledges its response did not meet the thirty-day timeframe. However, N.D.C.C. §29-32.1-06(1) empowers the court to allow further time for the state to respond. The thirty-day timeframe is not mandatory. Koenig v. State, 2018 ND 59, ¶7, 907 N.W.2d 344 (court does not abuse its discretion extending a time for a response absent proof of prejudice); N.D.C.C. 29-32.1-06(1).

[¶ 39] The district court found Hunter did not provide proof that a delay in asserting the affirmative defenses of res judicata and misuse of process was prejudicial. The district court asked generally about those concepts at the November 2019 hearing (at which Hunter was not present). The State asserted the defenses in its response prior to the January 2020 hearing. Hunter was given every opportunity to develop any evidence he wished during the hearing and provided four weeks to

submit his closing arguments. Hunter's counsel indicated near the close of the evidentiary hearing that she had presented all the evidence she needed to on the claims of judicial bias and the constitutionality of Hunter's confession. (PCR Doc ID# 34, Tr. at 174:23-176:21.) The district court concluded the affirmative defenses were not waived. (PCR Doc ID# 35, ¶12.)

[¶ 40] B. Res judicata barred repetitive bias claim

[¶ 41] The district court denied the bias claim as barred by res judicata. (PCR Doc ID# 35, ¶¶32-33.) In so doing, the district court referred to Hunter's extensive appellate brief in his criminal case. (PCR Doc ID# 21, ¶¶74-82.) In that brief Hunter argued, among other things, the trial judge's comments on false confessions reflected bias. This bias argument is rooted in the record of the criminal appeal, not the post-conviction hearing. The district court noted the same argument was made and decided in his criminal appeal. Hunter also claims the court allegedly and wrongfully read news articles. The district court described the circumstances of the article(s), quoting the trial judge as follows: "I don't know if it was in an in-chambers conference we had or if it was something I read in the paper, about Hunter being very happy with you." (PCR Doc ID# 35, ¶33; Crim. Doc ID# 620, Tr. 22:10-18.) The "you" the trial judge referenced was Hunter's current counsel, who later withdrew. The district court ruled that Hunter's bias argument "should have been or could have been fully determined" in his criminal appeal. (PCR Doc ID# 35, ¶33) Hunter, at ¶¶49-51.

[¶ 42] C. There was no judicial bias

[¶ 43] Hunter claims the bias issue is rooted in the ineffective representation of his trial counsel, hence it could not have been effectively addressed by this Court on direct appeal because he needed to develop a further record. This seems simply a ruse to make an end run around res judicata. However, even if this Court were to find res judicata did not bar this bias claim, there are no factual or legal bases for Hunter's claim.

[¶ 44] The law presumes judges are not prejudiced or biased. Rath v. Rath, 2016 ND 105, ¶¶12-13, 879 N.W.2d 735 (citations omitted). "For recusal to be warranted a judge must be partial or there must be some external influence that creates an appearance of impropriety." Id. A judge has a duty to recuse when required by the Code of Judicial Conduct. However, a judge has an equally strong duty not to recuse when the facts do not require recusal. Grasser v. Grasser, 2018 ND 85, ¶9, 909 N.W.2d 99. A defendant's claims that the trial judge has denied every single motion are insufficient, by themselves, to demonstrate bias. State v. Stockert, 2004 ND 146, ¶27, 684 N.W.2d 605.

[¶ 45] Hunter waves the flag of Canons 2 and 3, N.D. Code Jud. Conduct. However, he does not articulate how the trial judge's actions warranted recusal under those Canons. The judge is not the jury, which is limited to considering the evidence presented at trial. Arguably, a judge benefits from an awareness of what the potential jury pool may know about the case based upon media stories about that case. Hunter does not explain, and the State fails to appreciate, how such a benign

comment demonstrates the judge unfairly administered his judicial duties or applied the law. The district court said this: "Because the issue of judicial bias was determined on appeal and because Hunter has failed to point out any additional facts that could not have been previously raised, he has failed to show any prejudice from his counsel's failure to make this request. Furthermore, Hunter's allegations are either too vague or go to his dissatisfaction with the trial judge's decisions which are insufficient to show bias." (PCR Doc ID# 35, ¶34.) The "request" mentioned above relates to recusal or a potential for disqualification under Canons 2 and 3.

[¶ 46] After concluding the trial court correctly denied Hunter's motion for a change of judge, this Court further addressed Hunter's demand in case he intended it to rely on bias. As to that, this Court found: (1) his allegations were too vague; (2) knowledge obtained during a judicial proceeding is ordinarily not a basis for disqualification; and (3) his allegations amounted to nothing more that dissatisfaction with unfavorable rulings, which were insufficient to demonstrate bias. Hunter, at ¶51.

[¶ 47] The burden on post-conviction relief rests with Hunter. His claims remain as vague and unsubstantiated as they were when this Court previously denied them. He has failed to show any bias warranting recusal or disqualification.

[¶ 48] D. Hunter's counsel was not ineffective

[¶ 49] Hunter attempted to replace the trial judge using N.D.C.C. §29-15-21. That attempt was unsuccessful because the statutory provisions did not fit Hunter's circumstances. His counsel was not in control of those circumstances. Therefore, his lack of success does not mean he was ineffective. Nor was his counsel ineffective because he did not seek judicial recusal on the basis of bias. Had he tried, the claim would have been unsupported by factual or legal bases. Hunter's counsel was not ineffective for failing to advance an unsustainable claim.

[¶ 50] **III. The district court did not err in denying Hunter's post-conviction claim that his statement to officers was unconstitutionally acquired.**

[¶ 51] A. Miranda and res judicata

[¶ 52] Hunter argues his trial counsel was ineffective because he was unable to make more out of the allegedly unconstitutional method of obtaining his confession. As he did in his criminal appeal, Hunter alleges the confession was not voluntary because he was not Mirandized. The trial court held a 2-1/2-hour suppression hearing. (Crim. Doc ID# 306, Tr. at 1-138.) At that hearing a detective testified he gave Hunter Miranda warnings while Hunter was seated in another officer's squad car. (Crim. Doc ID# 306, Tr. at 38:22-39:9.) The judge actively participated in questioning the detective. (Crim. Doc ID# 306, Tr. at 69:5-72:19.) The court issued a 25-page decision denying the suppression motion. (Crim. Doc ID# 329.) The district court addressed this post-conviction argument at length. (PCR Doc ID# 21, ¶¶16-20.) The district court found Hunter's arguments that the

officer was never at the scene to give him the Miranda warnings, given the distance between crime scenes and the log of officers at the scenes, were the same arguments he made to this Court, were addressed by this Court and hence were barred by res judicata. (PCR Doc ID# 21, ¶18.) Hunter, at ¶¶9-20 (regarding Miranda); Hunter, at ¶¶21-34 (regarding voluntariness).

[¶ 53] Hunter argues that no evidence was presented to the jury regarding the nature of the accused, nor the setting in which the confession was obtained, including the duration and conditions, police attitude toward the defendant or his physical or mental condition. Hunter is mistaken in that argument. During the trial, officers provided testimony about the circumstances of Hunter's arrest, the conditions in which he was questioned, and the jury viewed the entire video of that questioning. (Crim. Doc ID# 632, Tr. 881:20-882:2, 895:15-910:20, 915:13-917:14.) Hunter, at ¶¶24-34.

[¶ 54] Hunter further argues his counsel was ineffective for not requesting a continuance to further investigate whether Hunter was Mirandized, suggesting that if his trial counsel had made that request, and thereby gained more time, he would have found additional witnesses, or done something more with the crime scene rosters, which he presumably thinks would cast the detective as a liar. The district court noted the trial court gave Hunter time to supplement his suppression motion, utilizing his private investigator. (PCR Doc ID# 21, ¶20.) However, Hunter's efforts to discredit the detective through the use of a witness and crime scene rosters proved unavailing. He offered nothing in post-conviction testimony to suggest

further efforts would be fruitful. Vague and speculative assertions that a continuance would have yielded better results do not satisfy the Strickland test.

[¶ 55] B. Voluntariness and res judicata

[¶ 56] Hunter argues that if he had sought and been granted a continuance, he would have found an expert that would have gotten Hunter's confession suppressed, or alternatively the jury would have heard expert testimony from which they would have determined his confession was false. (Appellate's Brief, ¶¶26, 28.)

[¶ 57] At the time of trial, the judge allowed Hunter an extensive offer of proof regarding false confessions through a video conference with Professor Alan Hirsch, along with related arguments of the parties. (Crim. Doc ID# 636, Tr. 1880-1897, 1901:4-22.) Thereafter, the court issued a verbal Order during trial, followed later by a related written Order, wherein he denied Prof. Hirsch's testimony as a false confessions expert, crafted a jury instruction regarding false confessions, and allowed Hunter the freedom to argue the concept of false confessions during closing. (Crim. Doc ID# 636, Tr. 1887:5-1901:3, 1901:23-1902:17; Crim Doc ID# 596; Crim. Doc ID# 578:25 (jury instruction).) This Court affirmed the trial court's exclusion of Prof. Hirsch's testimony. Hunter, at ¶¶43-47. Furthermore, Hunter made multiple pretrial suppression motions/claims, based upon various theories, related to his statements (confessions) to police and at the hospital. Those suppression motions/claims were denied by the trial court. Hunter directly appealed those denials. This Court wrote extensively about the suppression issues, as well as false confessions, in affirming the district court's actions. Hunter, ¶¶9-42. The

district court concluded that to the extent Hunter argues the trial court erred in not allowing testimony about false confessions, the argument is barred by res judicata. The State asserts that was a correct conclusion.

[¶ 58] C. Confession claims do not meet the Strickland test

[¶ 59] Hunter's post-conviction claim regarding voluntariness seems like another end run around the res judicata bar. However, even if this Court were to find res judicata did not apply or did not apply to his entire voluntariness-related claim, the State asserts Hunter's counsel was not ineffective.

[¶ 60] In an effort to argue his trial counsel was ineffective, Hunter proffered testimony from Dr. Mugge, a psychologist, at the post-conviction evidentiary hearing. (PCR Doc ID# 34, Tr. at 127-145.) Dr. Mugge testified about her process for evaluating someone for the potential of a false confession, including interviewing, conducting testing, writing a report, and the length of time it may take for that process. However, Dr. Mugge had not examined or tested Hunter, did not comment on whether such an evaluation would be favorable for Hunter, and was not clear whether a retrospective examination was possible.

[¶ 61] The trial court gave considerable thought to the false confession topic, as reflected in this Court's decision in Hunter's direct appeal. Hunter, at ¶¶43-47. Hunter's post-conviction argument presumes an expert could give favorable testimony about false confessions in Hunter's circumstances, the trial court would have allowed such testimony, and it would have made a difference to the jury, who otherwise had the opportunity to view the confession video. As noted by the district

court, the trial court commented that multiple jurisdictions do not allow expert testimony on false confessions. (PCR Doc ID# 35, ¶24.) The district court also noted the trial court was not interested in the level of suggestibility of an individual because that was for the jury to decide. (PCR Doc ID #35, ¶25; Crim. Doc ID# 635, Tr. at 1534:18-1535:11, 1536:7-11.) The district court also wrote that it was unlikely the trial court would have granted a continuance given that it had been clear at a March 2017 hearing that the trial, pending since June 2015, would be held in May 2017 and the court expected counsel to be prepared. (PCR Doc ID# 35, ¶26.)

[¶ 62] Hunter has offered only vague and speculative arguments that if he had sought a continuance, he would have been able to suppress Hunter's confession or provide the jury testimony that his was a false confession.

> [U]nless counsel's errors are so blatantly and obviously prejudicial that they would in all cases, regardless of the other evidence presented, create a reasonably probability of a different result, the prejudicial effect of counsel's errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial.

Brewer, at ¶9 (citations omitted). The district court found, and the State asserts, that his counsel's failure to seek a continuance to further address his confession does not meet the Strickland test.

[¶ 63] CONCLUSION

[¶ 64] For all the reasons provided above, the State respectfully requests this Honorable Court affirm the Judgment entered on May 18, 2020.

[¶ 65] Respectfully submitted on August 28, 2020.

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[¶ 66] CERTIFICATE OF SERVICE

[¶ 67] A true and correct copy of the foregoing document was sent by e-mail on August 28, 2020 to: Kiara C. Kraus-Parr (service@kpmwlaw.com).

Birch P. Burdick

[¶ 68] CERTIFICATE OF COMPLIANCE

[¶ 69] This brief complies with the page limit set forth in North Dakota Rules of Appellate Procedure 32(a)(8)(A) and is 21 pages in length.

Birch P. Burdick